United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

75-4021

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, CASE NO. 75-4021,
WARNER BROS. INC., ET AL., CASE NO. 75-4024,
SANDY FRANK PROGRAM SALES, INC., CASE NO. 75-4025,
WESTINGHOUSE BROADCASTING COMPANY, INC., CASE NO. 75-4026,
CBS INC., CASE NO. 75-4036,
Petitioners,

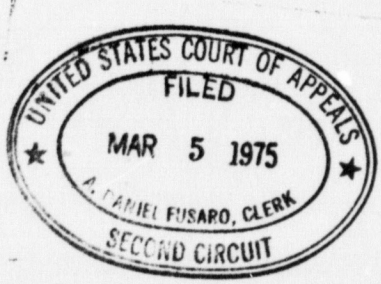
v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
NATIONAL BROADCASTING COMPANY, INC.,
WESTINGHOUSE BROADCASTING COMPANY, INC.,
WARNER BROS. INC., ET AL.,
NATIONAL COMMITTEE OF INDEPENDENT
TELEVISION PRODUCERS, ET AL.,
Intervenors.

ON PETITION FOR REVIEW OF SECOND REPORT AND ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR PETITIONER NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS



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THE COMMISSION'S JUSTIFICATION FOR PTAR III IS MUTUALLY EXCLUSIVE WITH ITS JUDICIALLY APPROVED JUSTIFICATION FOR THE PRIME TIME ACCESS RULE.

The Commission's primary justification for adopting the challenged exemptions is that they remove the Prime Time Access Rule's inhibition on the licensee right to exercise reasonable good faith programing judgments by permitting selection of network and off-network programs in the exempt categories. (See, e.g., the Commission's brief, page 47). The Prime Time Access Rule itself was found to be administratively essential and Constitutionally permissible because it removed an inhibition on that same licensee right inherent in the availability of programs from those same two sources. Because the rule liberated affiliates from their virtually absolute reliance on one of three program sources, it functioned "to open up the media to those whom the First Amendment primarily protects -- the general public." Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 478 (2d Cir. 1971). Accordingly, "far from violating the First Amendment, [the rule] appears to be a reasonable step toward fulfillment of its fundamental precepts." (Ibid at 477; See also the Commission's brief, page 43). If, as the Commission and this Court found 5 years ago, and the Commission still finds for all other purposes, the Prime Time Access Rule enhances speech, then the exemptions abridge speech. If, on

the other hand, as the Commission elsewhere alleges, the exemptions enhance speech, then the rule must abridge it. The Commission cannot have it both ways and be right. And since both the record and the Commission's own analysis thereof suggest the experiential accuracy of the 1970 hypothesis that the Prime Time Access Rule was speech enhancing, it follows necessarily that in abridging the rule the present exemptions would also abridge speech in derogation of their principal stated objective.

Nor, having missed the mark in this fundamental respect, can the Commission's rationale be found otherwise adequate and sufficient to sustain the action taken. This first and crucial error either serves as premise for or is itself repeated in every other argument advanced in justification for the exemptions. When the Commission argues that the exemptions will enhance speech by increasing the incidence of certain types of programs at 7:00 p.m. (Brief, pages 13-15, 26-27) it again reveals the fundamental confusion implicit in the entire Second Report and Order concerning the respective functions mandated by the Act for Commission and licensee in the First Amendment context. The Commission quite correctly notes that the inherent limitations on spectrum space require a degree of government involvement in broadcasting which goes beyond what would be permissible in the case of other media. Having reached this point, however, the Commission departs quite finally from both law and logic.

The Commission concludes that since "scarcity of spectrum ... has justified more extensive intrusion into speech" in this medium, case law striking down as Constitutionally repugnant regulations which classify preferred and disfavoured speech in other media "cannot be controlling." (Brief, pages 48-49, attempting to distinguish Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972)). But what law and logic dictate is that in performing its function of enhancing First Amendment freedoms the Commission must be permitted recourse to methods tailored to the unique nature of telecommunications. See Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 389-90 (1969); Citizens Committee to Save WEFM v. F.C.C., 506 F.2d 252, 275, note 32 (D.C. Cir. 1974) (Bazelon, C.J. concurring). To this end the Act delegates to the Commission a full range of powers [1/] designed in the final analysis to ensure the "wider and more effective use of radio in the public interest." 47 U.S.C.§303(g); See F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940); National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 219 (1943); Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 477-78, 480.

In carrying out this mandate to ensure the public's right to the widest use of a scarce commodity, however, the Act itself (47 U.S.C.

1/ See, e.g., 47 U.S.C.§§303, 307, 309, 311, 313, 314.

§326) makes very clear that the Commission role was multiplying voices, not deciding what they would say. Despite the inherent risk that private control of the airwaves could in theory be utilized to restrict public access to diverse views, Congress concluded when it adopted the Act "that of these two choices -- private or official censorship -- Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." Columbia Broadcasting System, Inc. v. D.N.C., 412 U.S. 94, 105 (1973). Indeed, had the Congress not so concluded, the Act itself might well have been unconstitutional. See Citizens Committee to Save WEFM v. F.C.C., supra, 506 F.2d 246, 281 (Bazelon, C.J. concurring). It is, in any event, an established tenet both of Constitutional law generally and of communications law specifically that "right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection." United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), affirmed, 326 U.S. 1 (1945); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969). The Commission itself took note of this fact in adopting the access rule, observing that "to the extent that close network supervision of so much of the Nation's programing centralizes creative control, it tends to work against the diversity of approach which would result from a more indepen-

dent position of producers developing programs in both network and syndication markets." Report and Order: Network Television Broadcasting, 23 F.C.C.2d 382, 394, reconsideration granted in part and denied in part, 25 F.C.C.2d 318 (1970), affirmed sub nom. Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470 (2d Cir. 1971).

Accordingly, the Commission's whole regulatory endeavour is directed not to achieving diverse programs but to administering the licensing scheme of the Act in such a way that its chosen licensees will do so. 2/ That the present emphasis on direct involvement in encouraging program types rather than program sources is without precedent is reflected in the Commission's own brief, which places complete and wholly unwarranted reliance on various kinds of past actions which in no case overlooked the fact that the Commission's role is limited to making sure that licensees perform the editorial function which is theirs alone. Thus the Commission

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2/ The Commission's present reversal of these Constitutionally and legislatively mandated priorities also loses sight of the old adage about one's impotence to do more than achieve propinquity between a horse and a drink. As the Commission observed when it adopted the Prime Time Access Rule, there remains the overriding fact that "in our commercial television system program diversity -- particularly in entertainment -- can be little greater in the longrun than sponsors are willing to support." Report and Order: Network Television Broadcasting, supra, 23 F.C.C.2d 382, 411. Perhaps in belated recollection of this fact, the Commission's Chairman, who last month persuaded the three networks to program only "family entertainment" between 8:00 and 9:00 p.m., this week endeavoured to persuade advertisers of the virtues of supporting those programs. See Broadcasting, March 3, 1975, page 23.

recites cases reflecting the entirely correct propositions that licensees must fulfill their program promises to the Commission as a condition of license renewal (Brief, page 54, citing Johnston Broadcasting Co. v. F.C.C., 175 F.2d 351 (D.C. Cir. 1949)); that licensees may not change unique entertainment formats in disregard of the ascertained tastes of significant segments of their audiences (Id., citing Citizens Committee to Save WEFM v. F.C.C., supra; and Citizens Committee to Preserve the Voice of the Arts in Atlanta v. F.C.C., 436 F.2d 263 (D.C. Cir. 1970)); and finally, that comparative renewal cases require consideration of the quality of service a licensee will give his public (Id., citing Citizens Communications Center v. F.C.C., 463 F.2d 822 (D.C. Cir. 1972)).[3/] The

3/ The Commission's paraphrase of a statement in the cited per curiam opinion wrenches out of its crucial context a phrase concerning consideration of "quality" licensee program service which the Court took from its own full opinion (447 F.2d 1201, 1213 (D.C. Cir. 1971)), reversing a proposed Commission policy which virtually gave lifetime licenses to incumbent licensees. That opinion made clear both the fact that the Commission's essential concern must be with the effort and money invested by a licensee in his programing and the fact that even that limited and necessary form of involvement is rife with nice Constitutional questions:

> The suggestion that the possibility of nonrenewal, however remote, might chill uninhibited, robust and wide-open speech cannot be taken lightly. But the Commission, of course, may not penalize exercise of First Amendment rights. And the statute does provide for judicial review. Indeed, the failure to promote the full exercise of First Amendment freedoms through the broadcast medium may be a consideration against license

(footnote continued on page 8)

Commission could have said much more. It could have said that license applicants must ascertain the needs and tastes of their audiences and propose programs to satisfy them, as a precondition to initial license. See Henry v. F.C.C., 302 F.2d 191 (D.C. Cir.), cert. denied, 371 U.S. 821 (1962).

What the Commission may not say, and never has said, is what a licensee may or may not broadcast (so long, of course, as it is not specif-

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(footnote continued from page 7)

> renewal. Unlike totalitarian regimes, in a free country there can be no authorized voice of government. Though dependent on government for its license, independence is perhaps the most important asset of the renewal applicant.
>
> The Policy Statement purports to strike a balance between the need for 'predictability and stability' and the need for a competitive spur. It does so by providing that the qualifications of challengers, no matter how superior they may be, may not be considered unless the incumbent's past performance is found not to have been 'substantially attuned' to the needs and interests of the community. Unfortunately, instead of stability the Policy Statement has produced rigor mortis. For over a year now, since the Policy Statement substantially limited a challenger's right to a full comparative hearing on the merits of his own application, not a single renewal challenge has been filed.
>
> Petitioners have come to this court to protest a Commission policy which violates the clear intent of the Communications Act that the award of a broadcasting license should be a 'public trust.' As a unanimous Supreme Court recently put it, 'It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.' Our decision today restores healthy competition by repudiating a Commission policy which is unreasonably weighted in favor of the licensees it is meant to regulate, to the great detriment of the listening and viewing public.

ically excluded from the protection of the First Amendment). And except for the plainly erroneous statement (Brief, page 52) that there is an appropriately "'preferred' class of news and public affairs programming," 4/ the Brief itself reflects the fact that Commission actions in the speech area have been upheld only when and because they "assure wider diversity of programming sources." Brief, pages 52-54. And the fact that this effect results in some cases from an action which superficially imposes a restriction, as in the case of the access rule itself, is not controlling. The controlling determination in analysis of a rule like the access rule or PTAR III, then, is not its form -- whether that be described as an "across-the-board restraint" as the Commission calls the access rule, or as a "relaxation of a restraint," as it calls PTAR III.

4/ Once it is determined that speech is protected, its protection cannot be conditioned on its nature. Police Department of Chicago v. Mosely, 408 U.S. 92, 95-96 (1972). In any event, "the line between the informing and the entertaining is too elusive" to permit of such distinctions: "What is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510 (1948). Nor is there any warrant in the access rule's original exemptions for on-the-spot and fast-breaking news events and for political appearances by candidates for inferring the existence of any such impermissible distinction from the Report and Order adopting the original rule, or from this Court's affirmance thereof, as the Commission appears to suggest. (See Brief, pages 27-28, 55). The exemptions to the original rule were premised not on program content or nature but solely on considerations of time, place and circumstance. See Report and Order: Network Television Broadcasting, supra, 23 F.C.C.2d 382, 394-95. No matter how tight their stranglehold on licensees, the networks do not control the course of history and live coverage of a 7:35 event cannot occur at 8:00.

Rather, the determination which must control is whether, in intent and effect, the design of the regulation at issue restricts or enhances the paramount right of the public to receive suitable access to ideas from diverse and antagonistic sources. Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 390 (1969); Associated Press v. United States, 326 U.S. 1, 20 (1945). The Commission found, and this Court agreed, that the Prime Time Access Rule would function to enhance this public right, previously largely defeated by virtue of the almost exclusive reliance of affiliates on their networks for prime time programs. Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 478, 480.

The intent and effect of PTAR III, on the other hand, is not to enhance public access to diverse and antagonistic program voices but to ensure public receipt of specific programs which the Commission deems suitable, from those sources which the Commission deems most capable of providing them -- the very same sources whose domination of prime time works to reduce source diversity. PTAR III is therefore impermissible per se because its intent and effect is to restrict public access to programs from diverse sources.

It is also, and independently, impermissible because its operation works to the detriment of the lawfully promulgated and Constitutionally mandated regulation it purports to modify. To argue that PTAR III is an ap-

propriate regulation because it will ensure certain programs regardless of source is "to reverse the mandated priorities," as this Court held when the networks made a similar argument 5 years ago. 5/ Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 478. To argue that PTAR III will serve an unrelated Commission policy to the extent that it disserves the access rule (Brief, pages 25-29, 38-40) and is therefore justified is essentially to commit the same reversal of priorities. Quite aside from the fact that an unlawful action is not rendered reasonable because it also serves an arguably proper purpose, as this argument would have it, the regulatory power to compromise between conflicting policies to the derogation of one also necessarily assumes that there is an irreconcilable conflict and that the sacrifice of one policy is therefore essential to achievement of the other. See Northeast Airlines, Inc. v. C.A.B., 331 F.2d 579, 588 (1st Cir. 1964).

The Commission here concedes otherwise; indeed it essentially admits the observable fact that no balancing was even attempted: "the particular remedy chosen by the Commission [to the problem of encour-

5/ For this reason N.A.I.T.P.D. does indeed contend that any Commission action which increases network dominance while the Commission still purportedly adheres to the access rule's rationale that the public's right of access is inhibited thereby, is Constitutionally impermissible. And the fact that the issue before this Court in Mt. Mansfield was whether PTAR was "permissible" (Brief, page 41) rather than whether it was "required" cannot render its present abrogation, for the present reason, equally "permissible."

aging access time presentation of children's programs] was one which it believed preferable to another as a means of facilitating the availability of children's television programs through a greater contribution from the network's proven resources for such programs." Brief, page 27. In short, the "remedy" chosen was the only one which could hurt the access rule and it was chosen precisely for that reason -- to ensure that the networks would recapture the time from which the rule was designed to exclude them. The Commission refers glancingly to "another" alternative, network clearance of a later hour on nights when their exempt programs occupy access time, but dismisses it in a footnote because "[u]nder the Commission's remedy, the agency does not become involved in censorship, e.g. by requiring that a particular program be broadcast during a designated time period." Id.[6/]

And in so stating the Commission yet again reveals its confusion as to the fact that it is not the form of its exemptions but their intent and

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6/ The Commission also appears to suggest (Brief, pages 28-30) that any alternative short of returning time to the networks would fail because despite their record profits this year they are too poor to do the requisite programs without the temporal government subsidy here provided. It purports to find support for this position in the original Report and Order which reasoned that the more lucrative prime time hours were vital to establishment of a healthy independent syndication industry. Apparently they are now vital also to CBS; even though CBS is very happy producing 60 Minutes in fringe time the Commission asserts that "fringe time success is no substitute for prime time opportunity." Brief, page 28. How CBS' inadequate access to prime time became an issue here is not explained.

effect which renders them unlawful. This argument, pursued at greater length elsewhere, simply brings the Commission full circle to its starting position: the exemptions are designed to achieve the same end -- speech enhancement -- as the Prime Time Access Rule. Thus:

> The rule does not require, nor does it prohibit licensees from broadcasting any category of program. It is calculated to ensure that the broadcaster will have a wider range of programming from which he may select in his own best judgment those shows best qualified to serve the needs of his viewing community.

> The PTAR III exemption restricts network First Amendment rights considerably less than the abridgements approved by this Court in Mt. Mansfield. The PTAR I across-the-board restraint has been relaxed.
> Brief, page 47. (See also page 59).

Hypnotic repetition cannot alter the fact that the restraint which the Prime Time Access Rule was designed to reduce -- network inhibition of licensee recourse to diverse nonnetwork program sources -- has been directly increased by PTAR III. Nor can it alter the fact that the permissibility of an absolute ban on certain speech does not ipso facto render the "lesser" restriction involved in a selective ban permissible. Police Depart-

ment of Chicago v. Mosely, supra.[7/] That only its absolute and therefore absolutely neutral nature saved the access rule's ban from the illegality of PTAR III is evident from this Court's affirmance:

> ... Congress did not want the Federal Communications Commission to become a censoring agency. But the challenged regulations are not an exercise of censorship powers. The Commission has found that the wide range of choice theoretically available to licensees is either not in fact available or is not being exercised for economic reasons. It has acted in discharge of its statutory duty in seeking to correct that situation. The Commission does not dictate to the networks or the licensees, or the independent producers whom it hopes to stimulate, what they may broadcast or what they may not broadcast; it is merely ordering licensees to give others the opportunity to broadcast.
>
> Mt. Mansfield Television, Inc. v. F.C.C., supra, 442 F.2d 470, 480 (footnote omitted).

7/ The Commission's brief notes Mosely's allusion to the fact that conditions on time, place and manner of picketing may in some cases be necessary to further significant government interests and that "[s]imilarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets." Police Department of Chicago v. Mosely, 408 U.S. 92, 98 (1972). The Commission fails to note the irrevocable irrelevance of these statements to PTAR III, just as it apparently fails to note their direct relevance to the access rule itself (and to the exemptions therefrom). The unquoted following portion of the decision could as well refer to the present action: "In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation 'thus slips from the neutrality of time, place, and circumstance [which characterizes the original rule] into a concern about content.' This is never permitted." Ibid at 99 (quoting from Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 29). And the wholly inapposite rationale of the majority in the Commission's other case was that an absolute ban on all picketing on private property was permissible on the facts. Lloyd Corp. v. Tanner, 407 U.S. 551, 566, 570 (1972).

Nor, finally, can the Commission's reiteration that only the licensee's "best judgment" will determine whether it uses the exemptions avoid the impropriety which the Commission concedes (Brief, page 27) its own specific determinations would reflect. "Talk of 'responsibility' of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result .... Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government." Anti-Defamation League v. F.C.C., 403 F.2d 169, 172 (D.C. Cir. 1968), cert. denied, 394 U.S. 930 (1969). Just as the Commission seems to think their "permissive" nature salvages the exemptions, because it passes the regulatory buck to the licensee, so too does it advance the contention that PTAR III is justified because these general exemptions obviate the ad hoc waivers which have already led the Commission into Court for essentially the same reasons as did this Second Report and Order.[8/] Brief, page 60. The assertion that the Commission has not yet "engaged in a subjective analysis of any program's content" (Id.), while belied by the advance rulings on such specific programs as Wonderful World of Disney, is in any event immaterial since it is inevitable that once licensees and networks have made their

8/ N.A.I.T.P.D. v. F.C.C., D.C. Cir. Case No. 73-2052, argued October 17, 1974.

own judgments on the matter, as the Second Report and Order requires, there will be a need for "Commission supervision of the manner in which that function is performed," to the end that "the Commission still retains the ultimate power to determine what is and what is not permitted on the air. So this formulation does not advance the argument either Constitutionally, ideologically or practically." Anti-Defamation League v. F.C.C., supra, 403 F.2d 169, 172. 9/

In sum, the Commission has offered four justifications for these exemptions: that they reduce a restriction on licensee freedom and therefore advance the First Amendment; that they reduce a restriction on certain types of speech and therefore advance the First Amendment; that one of them advances another Commission objective and must therefore be deemed reasonable; and that they will diminish waiver requests by codifying the subjects of virtually every waiver ever granted and must therefore be deemed reasonable. The first two of these justifications overlook

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9/ The contention (Brief, page 14) that reducing waivers to exemptions lightens the Commission's administrative burden and therefore renders the exemptions reasonable, is, in the present context, essentially frivolous. The question on appeal is whether content related exceptions to the access rule, whether they be exemptions or waivers, are lawful and Constitutional. It is manifest that democracy is a very unhandy type of government and the Bill of Rights is the most administratively clumsy aspect of the whole thing. But considerations of efficiency can arise only after its requirements have been successfully navigated by a proposed agency rule.

the fact that the restrictions removed are replaced with a government restraint which is both illegal and unconstitutional. The third ignores the fact that gratuitous sacrifice of a Constitutionally and statutorily mandated objective is inherently impermissible and administratively irrational. And the last seeks simply to justify an improper action on the grounds that it is convenient and that greater improprieties preceded it. The reasons why PTAR III is unconstitutional, unlawful and administratively unreasonable are detailed in order in the National Association of Independent Television Producers and Distributors' main brief and nothing whatsoever in the brief for the respondent Commission even meets the controlling issues.

CONCLUSION

For the reasons stated above and in N.A.I.T.P.D.'s main brief, the Commission's judgment should be reversed and the programing categories should be set aside.

Respectfully submitted,

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5 March 1975

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	)	75-4026
Federal Communications Commission and United States of America,	)	75-4036
Respondents,	)	
American Broadcasting Companies, Inc., CBS Inc., National Broadcasting Company, Inc., Westinghouse Broadcasting Company, Inc., Warner Bros. Inc., et al., National Committee of Independent Television Producers, et al.,	)	
Intervenors.	)	

CERTIFICATE OF SERVICE

I, Arthur Eisenbach, hereby certify that the foregoing typewritten "Reply Brief for Petitioner National Association of Independent Television Producers and Distributors" was served on this 5th day of March 1975, by mailing true copies thereof, postage prepaid, to the following persons at the addresses shown below:

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